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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,
Petitioner,

vs.

PACIFIC POWER AND LIGHT CO., a Maine corporation, MOBILE AERIAL TOWERS, INC., an Indiana corporation and THE IDAHO FIRST NATIONAL BANK, a National Association,
Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

Page

Opinions below 2

Jurisdiction 2

Questions presented 2

Statement of case 3

Statute involved 3

Reasons for granting writ 8

I.

David Quedens was denied his constitutional right to a jury trial because there are material issues of fact as to each defendant 9

1. The liability of the power company—electricity

   A. It was an issue of fact for the jury to decide whether or not the power company took proper, affirmative action to protect appellant from its deadly uninsulated high voltage wires following the time that it had knowledge that plaintiff was working in the vicinity of said wires 9

   B. Power company's contention that it is exonerated from liability because it complied with bare minimum height requirements for the lines in question is preposterous 13

   C. It was a question of fact whether David Quedens knew about the wires in question and/or whether or not there was anything about his conduct which would excuse the power company from having performed its duty 14

2. Liability of the manufacturer for failure to utilize known safety devices—products liability 18

3. Liability of the bank—employer for injuries to employees of its contractor—special risk doctrine 21

II.

There was clearly jurisdiction over the defendant manufacturer under both case law and the Idaho statute—in a products liability case 24

III.

Trial court violated every known rule of law applicable to motions for summary judgment 25

Conclusion 27

TABLE OF AUTHORITIES CITED

Cases

	Page
Austin v. Riverside Portland Cement Co., 44 C.2d 225, 282 P.2d 69 (1955)	16
Beck v. Monmouth Lumber Co., 137 N.J.L. 268, 59 A.2d 400 (1948)	11
Black v. Public Service Electric & Gas Co., 265 A.2d 129 (1970)	11
Butland v. City of Caldwell, 51 Id. 483, 6 P.2d 493 (1931)	16
Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950)	18, 20
Chase v. Washington Water & Power Co., 111 P.2d 872 (1941)	12, 13
Consolidated Electric Co. v. United States of America for use and benefit of Gough Industries, Inc., 355 F.2d 437	26
Denton v. City of Twin Falls, 54 Id. 35, 28 P.2d 202 (1933)	16
Doggett v. Electronics Corp. of America, et al., 454 P.2d 63 (1969)	24, 25
Dunn v. Pacific Gas & Electric Co., 43 C.2d 265, 272 P.2d 745 (1954)	11
Fields v. Volkswagen of America, Inc., 555 P.2d 48 (1976)	24, 25
Folden v. Robinson, 364 P.2d 924 (Wash. 1961)	13
Gladden v. Missouri Pub. Serv. Co., 277 S.W.2d 510 (Mo. 1965)	13
Halverson v. American Hoist, 240 N.W.2d 303 (1976)	20
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	24
Jasper v. Skyhook Corp., 547 P.2d 1140 (N.Mex. 1976)	20
Kingsport Utilities v. Brown, 210 Tenn. 393, 299 S.W.2d 656 (1957)	12
Lozano v. Pacific Gas & Electric Co., 70 C.A.2d 415, 161 P.2d 74 (1945)	10, 11
Luque v. McLean, 8 C.3d 136 (1972)	19, 20
McKenzie v. Pacific Gas & Electric Co., 200 C.A.2d 731 (1962)	11
Merlo v. Public Service Co., 45 N.E.2d 665 (Ill. 1942)	13
Micallef v. Miehle Co., 89 N.Y.2d 376, 384 N.Y.S.2d 115 (1976)	19, 20
Miner v. Long Island Lighting Co., 353 N.E.2d 805 (1976)	13

CASES

	Page
Nevis v. Pacific Gas & Electric Co., 43 C.2d 626, 275 P.2d 761 (1954)	11, 13
Pike v. Frank G. Hough Co., 2 C.3d 465, 467 P.2d 229 (1970)	19, 20
Pope v. City of Los Angeles, 26 C.2d 515, 159 P.2d 931 (1945)	11
Probart v. Idaho Power Co., 258 P.2d 361 (1953)	12
Rindlisbaker v. Wilson, 519 P.2d 421 (1974)	19
Scott v. Pacific Power & Light Co., 35 P.2d 749 (1934)	11, 12
Shields v. Morton Chemical Co., 318 P.2d 857 (1974)	19
Sulphur Springs Valley Electric Corp., Inc. v. Beltran, 478 P.2d 128 (1970)	17
Van Ardsdale v. Hollinger, 68 Cal.2d 245, 437 P.2d 508 (1968)	21, 22, 23

Statutes

Idaho Code:	
Section 5-14, Subdivision B	25
Section 5-514	3
28 U.S.C. § 1254(1)	2

Texts

69 A.L.R.2d pp. 93, et seq.	12
73 Am.Jur.2d, Summary Judgments, Section 35	26
Restatement of Torts:	
Section 302	17
Section 416	21
Section 427	21
6 Moore's Federal Practice, Section 56.03	26
8 Witkin, Summary of California Law, Pages 2983, et seq.	16

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an incapacitated person, the petitioner herein, prays that a Writ of Certiorari issue to review the MEMORANDUM filed in the United States Court of Appeals for the Ninth Circuit on November 30, 1978 and the ORDER DENYING REHEARING by the same court filed herein on February 26, 1979.

OPINIONS BELOW

The opinion or MEMORANDUM of the United States Court of Appeals of the Ninth Circuit is attached hereto and marked Appendix "A". The MEMORANDUM DECISION AND ORDER and JUDGMENT OF DISMISSAL entered on motions for summary judgment are attached hereto and marked Appendices "B" and "C", respectively.

JURISDICTION

The Memorandum and Judgment of the United States Court of Appeals for the Ninth Circuit, Appendix "A" herein, was entered on November 30, 1978. A timely petition for rehearing was denied on February 26, 1979. The ORDER DENYING REHEARING BEFORE THE PANEL is attached hereto and marked Appendix "D". The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Was DAVID WILLIAM QUEDENS denied his constitutional right to a jury trial by the trial court granting summary judgments in favor of defendants herein thereby preventing jury consideration of the following questions:

1. Is there a duty upon a power company to take affirmative action to protect persons who foreseeably might be injured by coming into contact with uninsulated high voltage wires?

2. Is a manufacturer responsible for the consequence of accidents due to its failure to utilize known safety devices, regardless of whether the danger is latent or patent?

3. Is an employer responsible for personal injuries suffered by an employee of an independent contractor where the work was done under hazardous conditions known to such employer, and there were special risks of harm or injury involved in the activity in question?

II. Was there jurisdiction over defendant MOBILE AERIAL TOWERS, INC., an Indiana corporation, who placed its product into the stream of commerce knowing that it would be used in the State of Idaho?

III. Did the trial court violate the familiar rules of law applicable to motions for summary judgment in failing to draw all inferences and decide all doubts in favor of plaintiff?

STATUTE INVOLVED

Idaho Code, § 5-514.

STATEMENT OF CASE

Federal jurisdiction is based on diversity of citizenship, the plaintiff being a citizen of the State of Idaho, defendant PACIFIC POWER & LIGHT COMPANY being a Maine corporation, defendant MOBILE AERIAL TOWERS, INC., being an Indiana corporation, and defendant IDAHO FIRST NATIONAL BANK being an Idaho corporation. The accident depriving 23 year old DAVID WILLIAM QUEDENS of both of his hands and his mental capacity occurred at Sandpoint, Idaho on July 13, 1973. (C. 120-121, 131.) DAVID'S mother, plaintiff JOAN E. HELM, was appointed Guardian ad Litem because of his incapacity prior to filing the Complaint. (C. 4.)

DAVID was born in San Francisco, California in 1951. He served in the United States Navy from 1971 to 1973. (C. 104.) After his discharge from the Navy, he lived in Boise, Idaho. In March of 1973, he went to work for Davey Tree Company as a tree trimmer in Boise, having worked for them before for five months in 1971. (C. 96.) He has not worked since July 13, 1973, the date of his tragic accident and will be unable to do so for the rest of his life. His only marriage was terminated by a divorce and he has one child. (C. 95.)

On June 26, 1973, defendant IDAHO FIRST NATIONAL BANK at Sandpoint, Idaho, contracted with DAVID'S employer, Davey Tree Company to remove fourteen trees and prune twenty-nine others on a site being prepared for a new bank building. At such time the bank *was aware* of the existence of the high voltage lines traversing diagonally across Second Street in Sandpoint in the middle of the block. (C. 399.) One end of these wires was attached to the main line running parallel to the sidewalk in the vicinity of some of the trees which were to be trimmed. (C. 431:14, 19 and 22; 432.) The bank did not call the existence of these power lines which were sufficient to electrocute a person to the attention of any representative of Davey Tree Company, nor to the attention of DAVID and his assistant, Alex Sharpe, even though they had been working in this area for two weeks prior to the accident. (C. 401:12.) In fact, the bank took no affirmative steps to prevent the accident, such as requesting a shut-off of the current during the time that the work was taking place near these uninsulated high voltage wires which as aforesaid went across the street in the middle of the block. (C. 403:12.)

The uninsulated high voltage lines were owned, operated and maintained by defendant, PACIFIC POWER & LIGHT COMPANY. The wires were "No. 6" gauge, a small wire virtually invisible particularly when looking into the sunlight as DAVID was at the time of his accident. No warning such as posting on the power poles was given by PACIFIC POWER to any person regarding the intrinsic danger of said wires or that they were uninsulated. (C. 422:25, 430:29, 437:19, 440:10, 431, 432). Within one or two days prior to DAVID'S accident, PACIFIC POWER had *actually become aware* of the tree trimming operation, the work having been observed by PACIFIC POWER'S District Superintendent. No affirmative steps of any kind were taken by PACIFIC POWER to avoid the forseeable type of accident which occurred. (C. 458:25, 459-12.)

In doing their work, DAVID and SHARPE used a truck on which a boom was mounted carrying a bucket (sometimes referred to as a "cherrypicker") measuring 3′ by 1½′, being 3½′ deep. (SHARPE DEPO. 28:22.) The tools for the trimming job itself were a hydraulic pruner and a hydraulic saw. The person standing in the bucket would be visible from the bottom of his rib cage upwards. In its lowest position, the bucket was 12′ above the ground and could be easily raised to the height of the wires approximately 35′ above the ground. The boom can be operated by the person in the bucket and also by emergency equipment attached to the truck. (SHARPE DEPO. 27:6; 29:1; 31:15; BOYLE DEPO. 82:3, 11:8.)

Just prior to the accident, at about 4:30 p.m., DAVID was in the bucket approximately 15′ to 20′ from the closest limb of a tree which he surveyed in order to determine the

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Just prior to the accident, at about 4:30 p.m., DAVID was in the bucket approximately 15′ to 20′ from the closest limb of a tree which he surveyed in order to determine the

details of the trimming. (SHARPE DEPO. 55:9.) He was facing in a southwesterly direction, *looking towards the sun.* (BOYLE DEPO. 75:13, 76:5.) DAVID raised the bucket, which was his usual custom in order to improve his looking at the tree, and while doing so, raised the bucket between two of the high voltage wires which were approximately three feet apart. (BOYLE DEPO. 15:23.) He then lowered his hands toward the rim of the bucket and, while doing so, touched one of the wires with each hand. (BOYLE DEPO. 78:8.) As a consequence, he was electrocuted resulting in a total loss of his brain power to a point where he is unable to recognize his mother. Both arms were amputated at the elbow level. His medical expenses have been in excess of $50,000.00. (C. 99.)

The only eye witness to the incident was BOYLE who had stopped approximately 200′ from the scene of the accident at the street corner north thereof, and in his deposition testified as follows (BOYLE DEPO. 9:7):

> "I could see that he was getting close to the wires and I was wondering if he could—if he had seen them and this is where I figured the first—when the bucket first hesitated the first time that he had spotted the wires and had stopped and was going to move away from them. And then when he moved on up, I could see that he was going into in between two of them. I was standing watching and when I seen him stop in under the wires, I watched him raise and I was wondering to myself if he had seen the wires." (BOYLE DEPO. 84.21, C. 785.)
>
> "Question by the investigator: "It looked that he perhaps wanted to grab the side of the bucket?"
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> "Answer: "It could be. He might have dropped his one hand to reach for the control."

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"Question by the investigator: "It looked that he perhaps wanted to grab the side of the bucket?"

"Answer: "It could be. He might have dropped his one hand to reach for the control."

BOYLE also testified it was possible he told one of the investigators that DAVID may not have seen the wires because of the sun's location. (BOYLE DEPO. 84:21.)

DAVID'S position was duplicated three years later on the date of the accident, that is, July 13, by Scott Beamer, an electrical engineer. This was done in order to evaluate the impairment of DAVID'S vision by the sun, which he was facing. Beamer states that from DAVID'S position it was impossible to see the wires with which he came in contact and pictures submitted in opposition to the motions for summary judgment confirmed this statement. (C. 700: 13, 761:13.)

MOBILE AERIAL TOWERS, INC., an Indiana corporation, manufactured, sold and delivered to Davey Tree Company in Idaho the machinery used by DAVID at the time of the accident. (C. 486 and 501.) This defendant was served out of state. The complaint alleged, and documents submitted in opposition to the motions for summary judgment proved, that at the time of the accident various safety devices were on the market which issued a warning beeping-type signal if the bucket were to come in the vicinity of high voltage wires. These are sometimes called proximity warning devices. (C. 500.) The bucket used by DAVID did not carry such safety warning devices. (C. 494.) The trial court incredulously found that under these allegations service out of state was not sufficient to confer jurisdiction on the United States District Court over MOBILE AERIAL TOWERS, INC. in the State of Idaho.

The defense introduced as part of the motion for summary judgment an affidavit by DAVID'S superior while

he was working for Davey Tree Company the first time in 1971. DAVID'S then foreman stated that he had instructed DAVID to stay at a safe distance from high voltage wires and of the danger resulting from touching the same. The affidavit also stated that declarant had visited the scene of the accident after the incident in question and had no explanation as to why DAVID should have been in his position at the time of his injuries. (C. 597.) The affidavit was obtained unilaterally and not by deposition. There was never any cross-examination of said gentleman.

Shortly before the accident, *DAVID told his assistant that the work day was almost over and that they would go down and do their laundry at a laundromat before returning to their motel room.* DAVID had befriended a young lady during the time of the work in Sandpoint and had dated her on several occasions. DAVID was not an abuser of alcohol, was not subject to depressions and was always competent and efficient in his work. (SHARPE DEPO. 117:66, 52:3, 53:1, 92:13, 60:14.)

Unbelievably, based on these facts, the trial court reached the conclusion on motion for summary judgment that DAVID was bent on an *act of self-destruction* and granted the defendants' summary judgment motions.

REASONS FOR GRANTING WRIT

Young DAVID QUEDENS at the time of the catastrophic accident in question was only 22 years old. As indicated, supra, he not only lost both of his hands, but also his mental capacity and accordingly at no time during these proceedings was able to speak for himself or give his ver-

sion of what really happened at the time and place of the accident. The court below instead of following the familiar rules applicable to motions for summary judgment which require all inferences and doubts to be resolved against the party moving for summary judgment, chose to pick out bits and pieces of evidence which it felt would support the motions of the defendants' in their theory of the case, thereby depriving DAVID of his constitutional right to a jury trial, and in particular to have the jury determine the issues of fact involved in this case. Because of the tragic nature of the injuries involved and the extreme seriousness of this case we ask this court as the court of last resort to seriously look at the points involved in order to over-turn the incredible and unbelievable miscarriage of justice that has taken place. We will briefly summarize the more important such points which are more fully set forth in our briefs filed below. Same are as follows:

I.

DAVID QUEDENS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL BECAUSE THERE ARE MATERIAL ISSUES OF FACT AS TO EACH DEFENDANT.

1. The Liability of the Power Company—Electricity

A. It was an issue of fact for the jury to decide whether or not the power company took proper, affirmative action to protect appellant from its deadly uninsulated high voltage wires following the time that it had knowledge that plaintiff was working in the vicinity of said wires.

Electricity is recognized as one of the most deadly instrumentalities known to mankind. It is a silent, deadly killer,

likened to the dangers of a concealed cobra. And because thereof the courts in this land have uniformally held that the purveyor thereof is held to the highest possible care and that it must exercise the utmost care and prudence that is humanly possible under the circumstances to prevent injury, and that most importantly *when circumstances change*, as for example when men and equipment commence working in the area of said wires that it must immediately and forthwith take positive, affirmative action *to do whatever is necessary* to prevent injury and/or death from occurring, as for example to insulate the wires, to temporarily disconnect them, to temporarily raise them, to put colored markers on them, or to take whatever other steps are feasible to prevent injury. *This is known as the affirmative duty and/or action rule.*

One of the lead cases setting forth said doctrine is *Lozano v. Pacific Gas & Electric Co.*, 70 C.A.2d 415, 161 P.2d 74 (1945), which case involved two workers who were killed when a light tower they were pushing came in contact with an uninsulated high voltage wire which was 43 feet above the ground and which ran over the work area in question—a wire that was considerably higher than the ones in the instant case. The court in said case set forth the liability of the power company and its affirmative duties to take immediate action to prevent injury as follows:

> "The duty of due care with which the company was charged consists not only in the proper installation of the dangerous instrumentality but in the maintenance thereof in a safe condition *at all times and places and under the changing circumstances of the particular case*. Even if at the outset of the installation of the equipment the company may have been entirely free from fault, yet, *if, under changing circumstances,* a hazardous condition arose, *non-action* or the *failure to remedy such condition* would constitute culpable negligence." (*Lozano v. Pacific Gas & Electric Co., supra,* at p. 422.) (Emphasis added.)

The court in discussing some of the numerous things that the power company could have done to have prevented injury in said *Lozano* case with knowledge of the work going on in the area stated at page 422 as follows:

> "The record herein shows that there was ample evidence to permit the jury to conclude that the appellant company *could have prevented the accident either by insulating the wires, by placing them at a greater height above the ground, by running them in an underground conduit or by guarding them in some other fashion.* While the appellant was not under an absolute duty to insulate or make the wires safe in any *particular* manner *it was 'its duty to make the wires safe under all the exigencies offered by the surrounding circumstances.'* " (Emphasis added.)

There are literally dozens of other cases that we could cite which set forth this same humanitarian, elementary and just rule of law. Some of the many celebrated cases so ho' ing are:

Pope v. City of Los Angeles, 26 C.2d 515, 159 P.2d 931 (1945); *Dunn v. Pacific Gas & Electric Co.,* 43 C.2d 265, 272 P.2d 745 (1954); *McKenzie v. Pacific Gas & Electric Co.,* 200 C.A.2d 731 (1962); *Nevis v. Pacific Gas & Electric Co.,* 43 C.2d 626, 275 P.2d 761 (1954); *Black v. Public Service Electric & Gas Co.,* 265 A.2d 129 (1970); *Beck v. Monmouth Lumber Co.,* 137 N.J.L. 268, 59 A.2d 400 (1948); *Scott v.*

Pacific Power & Light Co., 35 P.2d 749 (1934); *Kingsport Utilities v. Brown*, 210 Tenn. 393, 299 S.W.2d 656 (1957), [This case is on all fours with the instant case and holds very clearly that at the very least it was a question of fact about which reasonable minds could differ as to whether or not the utility company was negligent in not having taken steps to make its wires safe when it knew construction work was taking place, and the court so held inspite of the fact that the minimum standards of the electrical code were met at the time of the accident and at the time the wires were installed]; *Chase v. Washington Water & Power Co.*, 111 P.2d 872 (1941) [Idaho case]; and, for a plethora of other cases see 69 A.L.R.2d p. 93 et seq.

The *Probart v. Idaho Power Co.* case, 258 P.2d 361 (1953), relied on by defendant power company is clearly distinguishable from the case at bar because in that case unlike in the present case the power company had no knowledge of the fact the construction equipment was working in the area in question. In the instant case it is uncontradicted that the power company had actual knowledge of precisely what type of men, equipment and machinery were working in the area and of the changed circumstances involved.

Applying these elementary rules to the instant case it could easily be argued that the power company is liable as a matter of law because it took absolutely *no steps* to protect young DAVID QUEDENS and his co-worker, Alex Sharpe from injury with *actual knowledge* that they were working in the immediate vicinity of the wires in question. At the very least or minimum as set forth in the above-mentioned Tennessee case of *Kingsport Utilities v. Brown*, it was a question of fact for the jury to decide whether or

not the power company should have de-energized the wires, raised them, put colored markers on the wires, or taken other safety precautions to prevent the accident in question. Failing to let the jury decide this issue deprived plaintiff of his constitutional right to a jury trial.

B. Power company's contention that it is exonerated from liability because it complied with bare minimum height requirements for the lines in question is preposterous.

It is elementary horn-book law not only with reference to the liability of power companies but with reference to virtually all types of defendants as for example manufacturers and others, that compliance with bare minimum safety requirements merely has the effect of preventing a charge of negligence per se, and that compliance constitutes only a floor and not a ceiling to the defendants responsibility. Same are merely some evidence of due care to be considered by the jury along with all of the other evidence. Such compliance does not remove the factual determinations of whether or not under the particular changing circumstances or circumstances of the case in question there was negligence. For some of the numerous cases so holding see *Miner v. Long Island Lighting Co.*, 353 N.E.2d 805 (1976); *Folden v. Robinson*, 364 P.2d 924 (Wash. 1961); *Nevis v. Pacific Gas & Electric Co.*, 275 P.2d 761 (Cal. 1954); *Merlo v. Public Service Co.*, 45 N.E.2d 665 (Ill. 1942); *Gladden v. Missouri Pub. Serv. Co.*, 277 S.W.2d 510 (Mo. 1965); *Chase v. Washington Water & Power Co.*, 111 P.2d 872 (Id. 1941).

C. It was a question of fact whether DAVID QUEDENS knew about the wires in question and/or whether or not there was anything about his conduct which would excuse the power company from having performed its duty.

The trial court and in turn the appellate court below chose to indulge in every inference that it could to find in favor of the defendant power company and the other defendants in the instant case. To put it bluntly they simply ignored the inferences and facts which would permit a jury to conclude to the opposite effect or to the contrary. We will point out just a few of the items of evidence in this regard which clearly show that it should have been an issue of fact for the jury as to what DAVID saw, what he knew, and what his intent or state of mind was at the time of his accident. Same are as follows:

1. The witness BOYLE wondered in one of his statements whether DAVID actually knew his bucket was between the wires. (C. 785.)

2. The same witness stated that while lowering his hands DAVID may have grabbed for the bucket. (C. 785.)

3. DAVID was continuously employed from 1970 to July of 1973, including military service with two years in the Navy. And at the time of the accident he was in excellent health. (C. 98.)

4. DAVID was not a user of either drugs or alcohol to any excess. (SHARPE DEPO. 117:16.)

5. DAVID was not a person who took chances and he was an excellent worker. (SHARPE DEPO. 92:13.)

6. Immediately before the accident DAVID had told his working partner Sharpe that as soon as they were finished working after he finished this last cut *that they would go home and do their laundry.* (SHARPE DEPO. 60:14.) [Such testimony if believed by the jury coming from the only man who talked to DAVID immediately before the accident, we believe would be most persuasive in convincing them that DAVID was not bent on an act of self-destruction or suicide as found by the trial court and affirmed by the appellate court. At least such testimony creates an issue of fact on that issue for the jury to decide.]

7. DAVID was following his usual and customary routine in positioning himself at a high position to overlook a tree before commencing to trim it. (SHARPE DEPO. 55:9.)

To put it bluntly while one could possibly arrive at the conclusion that DAVID intended to kill himself by torturing the evidence in the case as was done by the trial court, there was without any question ample evidence to the opposite effect from which a jury could conclude to the contrary and which we believe they would have done had we had an opportunity to fully present the evidence in the case and to argue the matter. The question of what DAVID knew, what he saw and what his intent or state of mind was at the time of the accident without any question were questions of fact for the jury to decide and were not for the court to determine on a motion for summary judgment where there was no right to confront the witnesses and examine them under the crucible of cross-examination and to present all of the evidence bearing on the issues.

Assuming, arguendo, that DAVID had knowledge of these specific wires at some time before the accident in question, and this isn't at all clear from the evidence in the case, it was nevertheless a question of fact for the jury to decide whether or not DAVID should be excused entirely because of such elementary principles such as absorption in his work, distraction, momentary forgetfulness, fatigue, or because he was blinded by the sun, or for any one of numerous other reasons that can be thought of. And further and in any event assuming that they found some fault on his part, it was for the jury to decide whether or not under the Idaho rule of comparative negligence there should only be a percentage reduction in his recovery rather than a total bar to recovery. It is elementary tort law in almost all states in this country at the present time, including Idaho that forgetfulness of a known danger is not contributory negligence as a matter of law. Such a barbaric rule has been abandoned in virtually every state. For a thorough discussion of the law on this point see the discussion by Mr. Bernard Witkin, California's most distinguished legal scholar, in his *Summary of California Law,* 8th Ed. in Volume 4, Page 2983, et seq., where he discusses this principle and the absolute host of cases which cover the point in question. For Idaho cases so holding, see *Butland v. City of Caldwell,* 51 Id. 483 at 48, 6 P.2d 493 (1931) and *Denton v. City of Twin Falls,* 54 Id. 35 at 43, 28 P.2d 202 (1933).

For one of the lead cases in the United States discussing the law pertaining to the duty of care of workmen who must work in a place of possible danger see *Austin v. Riverside Portland Cement Co.,* 44 C.2d 225, 282 P.2d 69 (1955), a

case where two plaintiffs were injured when a crane with which they were working came into contact with an overhead electricity conduit. The court in said California Supreme Court case points out that the amount of caution required of a workman under such circumstances in the exercise of ordinary care is lessened and that whether the workman is guilty of contributory negligence is a question of fact, that is a jury question and is not to be decided by the court.

Finally, we wish to point out that Section 302 of the Restatement specifically exculpates the plaintiff in a situation where it is admitted that the plaintiff has been negligent or even reckless, where the negligence of the actor is such that he should realize that his act or omission involves an unreasonable risk of harm to another. As an illustration it is pointed out in said Restatement Section that one who leaves a hole in the street which would be easily discovered if a driver were attentive but may not be if the driver is inattentive may nevertheless be held liable. Certainly there is no comparison between the degree of culpability of a defendant under those circumstances compared with the culpability and responsibility of a power company who has actual knowledge of the fact that workmen are working in the very area of their deadly, uninsulated high voltage wires with the foreseeability that serious injury and/or death could occur. Such a situation is a thousand times more serious than the leaving of a hole in the street. See the recent Arizona Supreme Court case on this point *Sulphur Springs Valley Electric Corp., Inc. v. Beltran,* 478 P.2d 128 (1970).

In short the steps and actions which the power company should have taken were at least issues of fact for a jury to decide, and the conduct of DAVID QUEDENS was likewise a question of fact for the jury. And the trial court in depriving the jury of the right to make these determinations took away DAVID'S constitutional right to a jury trial.

2. Liability of the Manufacturer for Failure to Utilize Known Safety Devices—Products Liability

It was a question of fact for a jury to decide whether or not the manufacturer of the tree trimming rig was liable under the doctrines of strict liability and/or negligence for failure to utilize known safety devices to prevent injury or death where the risk of injury and/or death was great—even if it be conceded, which it is not, that the danger was open and obvious, or patent instead of latent.

For many years, hundreds of thousands of workmen and consumers have been barred from recovery because of the infamous rule established in the New York case of *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), which in substance held that there could be no liability for the failure to provide safety devices if the condition in question was patent rather than latent, or obvious rather than concealed. There probably has been no more bitterly criticized rule in the history of American Jurisprudence than the said *Campo* rule. Virtually all of the legal scholars and commentators who have considered the same have pointed out the ridiculousness of the *Campo* rule and how it discourages safety progress on the part of manufacturers and others. In fact, the New York Court which established said

rule itself finally recognized this fact and over-turned its former decision. This was done in the celebrated case of *Micallef v. Miehle Co.*, 89 N.Y.2d 376, 384 N.Y.S.2d 115 (1976). The New York court in the said *Micallef* decision points out that it feels the law ought to encourage safety on the part of manufacturers rather than to discourage it however obvious the unsafe condition might be. *Micallef* in so holding follows numerous other cases which have so concluded.

One of the lead cases which thoroughly discusses this issue is *Pike v. Frank G. Hough Co.*, 2 C.3d 465, 467 P.2d 229 (1970), and then following *Pike*, the celebrated landmark case of *Luque v. McLean*, 8 C.3d 136 (1972), which case involved an injury which occurred because of the open port which was open and obvious but unguarded at the right front of a rotary lawnmower. The California Supreme Court in abolishing the latent versus patent dichotomy stated among other things as follows:

> "It would indeed be anomalous to allow plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing his manufacturers strict liability for doing the same thing. The result would be to immunize strict liability manufacturers who callously ignore patent dangers in their products while subjecting to such liability those who innocently market products with latent defects.

The Idaho cases of *Shields v. Morton Chemical Co.*, 318 P.2d 857 (1974), and the more recent case of *Rindlisbaker v. Wilson*, 519 P.2d 421 (1974), while not specifically called upon to decide this specific issue nevertheless cited said

California cases with approval. And we believe that under any reasonable logic that the Idaho court which to date has followed all of the California cases involving advancements in the law of products liability would clearly follow the enlightened rule of *Pike, Luque,* and *Miscallef,* cited *supra.*

Defendant manufacturer relies on the Minnesota case of *Halverson v. American Hoist,* 240 N.W.2d 303 (1976) and the later case of *Jasper v. Skyhook Corp.,* 547 P.2d 1140 (N.Mex. 1976). A careful reading of said cases discloses that they are no authority for holding that the Idaho court would likely follow the *Campo* rule at all. *Halverson* relies on the *Campo* rule which as hereinabove set forth has been both discredited and overturned by the very court that established the rule, and *Jasper v. Skyhook Corp.* in turn relies on the *Halverson* case and does not refer to or indicate any knowledge of the fact that *Campo* as aforesaid has been both discredited and overruled.

In summary the modern trend and clear weight of authority is to hold a manufacturer liable both in negligence and in strict liability for failure to use known safety devices on its products. Proximity warning devices have been in use for many years, and same would have warned DAVID of his close proximity to the deadly uninsulated wires in question. He would have been immediately alerted and could have taken appropriate action to protect himself. One could well argue that the manufacturer is liable as a matter of law for the failure to use such simple safety devices, particularly where the potentiality for serious injury or death is so great. At the very least the question

should have been an issue of fact for the jury, particularly since the tree trimming rig was designed to be used in close proximity to high voltage lines. DAVID QUEDENS was deprived of his constitutional right to a jury trial and was deprived of the right to have a jury decide this issue.

3. Liability of the Bank—Employer for Injuries to Employees of Its Contractor—Special Risk Doctrine

It was a question of fact for a jury to decide whether or not there were peculiar risks of physical harm to the employees of the independent contractor, Davey Tree Company unless special precautions were taken.

Both Sections 416 and 427 of the Restatement of Torts impose a non-delegable duty on the employer of an independent contractor to his employees where there are peculiar risks of physical harm at the work place, unless special precautions are taken. Under Section 416, such liability is imposed even if the contractor has agreed to be fully responsible for all such risks. [There is no evidence, however, that the contractor had made any such agreement in the instant case.]

Said sections in no way limit the employer's liability to accidents which might occur on the employer's property only. Said sections and the cases interpreting same speak in terms of the work area or place, rather than to the issue of whether or not the employer owns said workplace.

The celebrated case of *Van Ardsdale v. Hollinger,* 68 C.2d 245, 437 P.2d 508 (1968) considered and decided the issue of whether or not the intent of said Restatement Sections was to apply them to employees of independent con-

tractors, and the California Supreme Court held very decisively that such was the intent. In this regard, the California Supreme Court, at page 254 states as follows:

> "This court has held that employees of an independent contractor come within the word 'others' as used in sections 413, 414 and 428 of the Restatement of Torts, which like Section 416, set forth rules relating to the liability of one hiring an independent contractor. . . . It has recently been held that Section 416 of the Restatement of Torts is applicable in California in an action by an employee of the independent contractor . . . , and other jurisdictions have extended the liability of one who hires an independent contractor to do dangerous work to the employees of the contractor. See 23 A.L.R. 1084, 1129-1135." (*Van Arsdale, supra,* at p. 254.) (Emphasis added.)

The *Van Arsdale* court then went on to hold the defendant liable as a matter of law for failing to eradicate the markings of the white lines on a busy street while one of the three lanes was kept open to traffic. The court held that absent special precautions to keep the traffic proceeding in the open lane from going into the other lanes, the work was highly dangerous, and that the necessity for such precautions was inherent in the work and was obvious before the work commenced. The court further stated that while the contract of the defendant provided for the contractor to take special precautions, this makes no difference because *this duty is non-delegable*, and that therefore the employees of the independent contractor could recover from the defendant city for the failure of the contractor to take precautions to protect said employees, and likewise because the defendant city had a non-delegable duty.

In the instant case, we cannot possibly conceive of any special risk, danger or hazard that could be any greater than that presented by high voltage lines such as the ones in this case, which were unguarded, unprotected and uninsulated, and which were in the very heart of the construction site area, that is, in immediate proximity to the trees which the defendant Bank had hired the contractor to trim. Certainly such a risk should fall within the type of special risks contemplated by the Restatement sections hereinabove set forth, and the Bank should be deemed to have a non-delegable duty. In fact, we feel that the Bank should be held liable *as a matter of law, just as the California Supreme Court did* in the *Van Arsdale* case cited *supra.* We submit that certainly, at the least, there is a genuine issue of fact as to whether or not the said Bank, which owned the land immediately adjacent to said wires and which was getting ready to construct a new building on said property, should fall within the special risk doctrine. We submit, indulging in all evidence and inferences favorable to plaintiff, that plaintiff is clearly entitled to his day in court on this issue.

DAVID QUEDENS was deprived of his constitutional right to have a jury decide these issues as to the defendant Bank. If there was going to be any granting of judgment as a matter of law, it should have been in favor of DAVID QUEDENS rather than the Bank as was done in the said *Van Arsdale* case cited *supra.*

II.

THERE WAS CLEARLY JURISDICTION OVER THE DEFENDANT MANUFACTURER UNDER BOTH CASE LAW AND THE IDAHO STATUTE—IN A PRODUCTS LIABILITY CASE

It is frankly incomprehensible that the trial court and in turn the appellate court found that there was no jurisdiction in Idaho over the defendant manufacturer, in light of all of the recent cases in the products liability field on the issue of jurisdiction and further under the Idaho case law itself and under the Idaho long-arm statute. The unmistakable and clear trend of the courts in this country has been to invoke jurisdiction against manufacturers in products liability cases who manufacture their products in one state but place them in the stream of commerce with knowledge that they may be used in any one of the 50 states and cause injury if defective in design or manufacture. One of the most recent cases discussing this stream of commerce theory in products liability cases is *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (1976). The Oklahoma court held that following the fundamental fairness doctrine set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), that if a manufacturer places its product into the stream of commerce with knowledge that it can be used in the State of Oklahoma and that if defective it could cause injury, that this was a sufficient jurisdictional basis for due process and compliance with fundamental principles of fairness. The Idaho Supreme Court also has clearly followed the stream of commerce theory and did so even before said *Fields* case in *Doggett v. Electronics Corp. of America, et al.*, 454 P.2d 63 (1969).

If anything the language in the *Doggett* case is even stronger than that in the *Fields* case.

Finally, the Idaho Supreme Court makes it very clear in *Doggett* that under the Idaho long-arm statute, namely Idaho Code § 5-14, Subdivision B, if a tortious act is committed in the State of Idaho, this alone is a sufficient basis for jurisdiction. The court holds that a tortious act may be a combination of not only the negligent act but also the injury, and that for an act to be tortious there must be injury, and that accordingly the concept of injury is an inseparable part of the phrase. And that accordingly under the Idaho long-arm statute where the injury occurs in Idaho, there is no question but what there is jurisdiction.

In short, under both the stream of commerce theory which applies in Idaho in products liability cases and elsewhere and also under the Idaho long-arm statute, the lower court is clearly wrong in holding that there is no jurisdiction in Idaho since the tortious act and/or injury occurred in the State of Idaho.

III.

TRIAL COURT VIOLATED EVERY KNOWN RULE OF LAW APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

It is elementary horn-book law and certainly elementary federal law that the party against whom a motion for summary judgment is made must be given the benefit of all favorable inferences and doubts, and that all pleadings, affidavits, and other documents must be liberally construed in that parties favor and that if there is any doubt it must

be construed against the party who makes the motion for summary judgment. Further, whereas in the instant case, the issue was raised of the intent or state of mind of young DAVID QUEDENS it is highly unusual and extraordinary for a trial court to determine that issue on a motion for summary judgment.

One of the lead cases setting forth these principles and particularly the one pertaining to the state of mind issue, is the case of *Consolidated Electric Co. v. United States of America for use and benefit of Gough Industries, Inc.*, 355 F.2d 437 and 438. For some of the numerous other authorities setting forth these elementary rules, see the numerous cases cited in 73 Am.Jur.2d, in the section on Summary Judgments, § 35 at Pages 763 to 764, and 6 *Moore's Federal Practice*, § 56.03 (10, at Page 2043 (2 Ed. 1953)).

The trial judge in the instant case incredibly ignored each and every one of these elementary rules, as has hereinabove been set forth. *How he could decide on a motion for summary judgment that DAVID QUEDENS was bent on an act of self-destruction when as set forth in the factual portion of this Petition he had just told his fellow worker that after this last run they would go home and do their laundry, is totally incomprehensible.* We could take each of the issues hereinabove more fully discussed and make similar observations. With reference to each one of said issues, while one might make some kind of an argument to the contrary as did the trial judge in the instant case, one can make equally strong and credible arguments the other

way and these decisions were for the jury and not the trial judge.

In summary every known rule of federal law pertaining to how summary judgments should be handled was violated in this case, and this court should remind trial courts of the purpose of summary judgments and of what their powers and limitations are so that cases which *make a mockery of justice like this one don't continue to occur in the future.*

CONCLUSION

We respectfully pray that this Petition be granted.

Dated: May 21, 1979.

ROBERT E. CARTWRIGHT, ESQUIRE
WALTER H. MEDAK, ESQUIRE
BRUCE O. ROBINSON, ESQUIRE

CARTWRIGHT, SUCHERMAN,
SLOBODIN & FOWLER, INC.

By ROBERT E. CARTWRIGHT
Attorneys for Petitioner

(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
for the Ninth Circuit

Joan E. Helm, individually & as Guardian ad Litem for David William Quedens, an incapacitated person, Plaintiff-Appellant vs. Pacific Power and Light Co., a Maine corp., Mobile Aerial Towers, Inc., an Indiana corp., and The Idaho First National Bank, a National Assoc., Defendants-Appellees Davey Tree Expert Co., a foreign corp. and Aetna Casualty & Surety Co., a foreign corp., Plaintiff-Intervenors	No. 77-1352
Joan E. Helm, etc., Plaintiff-Appellant, vs. Pacific Power & Light Co., etc., et al., Defendants-Appellees Davey Tree Expert Co., etc., et al., Plaintiff-Intervenors	No. 77-1353

[Filed November 30, 1978]

Appeal from the United States District Court
for the District of Idaho

MEMORANDUM

Before: VAN DUSEN,* WRIGHT and GOODWIN, Circuit Judges.

This appeal is from an August 1976 district court judgment granting the defendants' motions for summary judgment and an October 1976 order denying the plaintiff's Federal Rule of Civil Procedure 60(b) motion. After consideration of oral argument and the record, the district court judgment and order will be affirmed.

Plaintiff-appellant, David Quedens, 22, represented by his mother and guardian ad litem, Joan E. Helm, suffered severe injuries resulting in the loss of all mental capacity and speech and part of both of his arms when he simultaneously touched uninsulated high voltage wires while performing tree-trimming work. He was employed by Davey Tree Expert Co. (Davey Co.), of Boise, Idaho, and was working pursuant to a contract between Davey Co. and the defendant-appellee, Idaho First National Bank. Quedens had previous tree-trimming experience, having worked for Davey Co. and a California company before entering the armed services in 1971. Quedens returned to Davey Co. in March 1973. The accident occurred on July 13, 1973.

Prior to the granting of the bid by the defendant Bank to Davey Co., Quedens accompanied James Marria, a sales representative and his former supervisor, to the job site to analyze the work required. At this time, Quedens' attention was directed to the power lines owned by the defendant-appellee, Pacific Power & Light Co. (Power Co.), and he was reminded of the necessary safety precautions which he

*Senior Circuit Judge for the Third Circuit.

had learned two years before. Marria instructed Quedens not to get the bucket, which was at the end of a hydraulically extendable mobile tower, or any part of the boom nearer than six feet from the power lines.

On the day of the accident, Quedens and his assistant, Sharpe, were using a truck manufactured by defendant-appellee, Mobile Aerial Towers, Inc. (Mobile), which held a boom carrying a bucket measuring three feet by one and one-half feet by three and one-half feet deep. There were no devices on the machinery to detect proximity of electrical wires. Quedens was located in the bucket, which had controls to operate the boom. There was also a control panel in the truck to lower the boom in case of emergency.

Quedens had trimmed two sides of the trees from the inside of the Bank's lot and then moved the truck with the bucket into the adjoining street, approximately 15 feet from the tree he was about to trim. The three uninsulated wires, almost two times the minimum height required by the safety code, were 39 feet above the street and spaced three feet from each other. They passed diagonally over the street and over and above the trees where the work was to be performed. At this point, Quedens raised the boom and the bucket to a position one foot below and between two of the three wires. He was then standing between the two wires, which were approximately at the level of his waist. Quedens raised his hands and arms above the wires and appeared to be shouting or talking to Sharpe on the ground. Plaintiff then suddenly dropped his arms to his sides and both hands touched the wires, resulting in the injuries suffered. The boom was immediately lowered through the emergency controls in the truck. At the

time of the contact, the bucket was positioned over the street and "a good 15-20 feet away from the closest limb."[1]

Quedens' immediate superiors and his co-workers regarded him as a competent, experienced and knowledgeable tree trimmer and boom operator in the vicinity of power lines. As a part of Davey policy, Marria had conducted in 1971 weekly safety meetings for the benefit of his crews. Quedens participated in these "tailgate" meetings in 1971. Also, Marria stressed to his crew the dangers involved and that they should be "extremely careful in operating our high-rise booms near these power lines."

During the time that Quedens was trimming trees in the area of the new bank site, no Power Co. official or employee was contacted, advised, or informed by any bank officials, architects, or employees of the tree-trimming contractor that any contractor or its employees would be working within 10 feet of the Power Co. power lines. There was no evidence that Power Co. was aware prior to the time of the accident that the type of boom used in the area could be raised to a height whereby it could come in contact with the overhead transverse voltage lines.

Plaintiff brought suit against defendants Power Co., Mobile and Idaho First National Bank. Upon motions of the defendants for summary judgment, oral argument was heard. The district court granted the motions and entered judgment for all defendants. Plaintiff filed an appeal to this court and a F. R. Civ. P. 60(b) motion to the district court for relief on the basis of newly discovered evidence

[1]Deposition of Boyle, pp. 66-67; see also deposition of Sharpe, p. 59, lines 22-24.

in the form of expert opinions. The district court subsequently denied the Rule 60(b) motion.

I. *Summary judgment was properly granted.*

The summary judgment motions were properly granted. The record does not demonstrate any genuine issue of material fact.[2]

[2]James G. Marria executed under oath an affidavit in May 1976 which commences with these paragraphs (R. 597-98):

"JAMES G. MARRIA, after first being duly sworn deposes and says:

"That during the summer and fall months of 1971 I was employed as a foreman of a tree trimming crew for the Davey Tree Expert Company. Our crew was working out of Boise, Idaho. David Quedens was a member of my crew during approximately the months of July, August and September, 1971.

"Our crew's exclusive function during this period of time was to trim trees along utility power lines. We worked forty-five (45) hours a week clearing trees from these power lines.

"As part of my job responsibility as foreman of this crew, I did conduct weekly safety meetings for the benefit of my crew. These meetings were referred to as 'tailgate' meetings. Because we were constantly working around power lines during these 'tailgate' meetings I would stress to my crew members, which included David Quedens, that they should be extremely careful in operating our high rise booms near these power lines. My crew was instructed that the bucket containing the operator should never be positioned closer than six feet from any power-line. Because I personally stressed the importance of the fact that an operator should never maneuver his bucket closer than six feet to these power lines I knew that David Quedens as one of my crew members was personally aware of my company's safety policies in this regard. Every member of my crew, which included David Quedens was fully aware of the potential danger involved in working around power lines.

"In my opinion, David Quendens was a competent operator of the Mobile Aerial Tower's 'cherry picker boom' and was experienced in trimming trees in the vicinity of power lines.

"That on or about March of 1973 David Quedens was rehired by Davey Tree Experts Company. At this time I was working as a sales representative for Davey Tree Experts Company. David Quedens was, during this period of time, working

There is no evidence on the record refuting Morria's statement that he had specifically warned Quedens of the

as foreman of a crew that did residential and commercial tree trimming.

"That on or about the later part of June, 1973, I was preparing a bid for tree trimming work at the request of The Idaho First National Bank. That bank wanted the trees near their Sandpoint Branch office trimmed.

"I knew if we got that bid David Quedens' crew would be assigned to perform that work. Because I wanted him to be familiar with the job site and the nature of the work to be done, I had David Quedens accompany me to the location of The Idaho First National Bank in Sandpoint, Idaho. David and I drove to Sandpoint to analyze the work to be done and to prepare a bid for the job."

The plaintiff attempted to cast doubt on Marria's affidavit by asserting that Sharpe, Quedens' assistant, had not been specifically trained in dealing with high voltage wires since Marria had stated that Quedens was so trained. However, the meetings at which Quedens received his training from Marria were in 1971, when Marria was Quedens' foreman. This is made clear by the language in the foregoing paragraphs. Sharpe was not employed with Davey Tree at that time. Upon Quedens' return to Davey Tree and the subsequent hiring of Sharpe, Marria was made a sales representative and Quedens became foreman.

Also, the affidavit of Marria contains these paragraphs at R. 598-99:

"When we viewed the premises we discussed the type of trimming work that needed to be done. Some of the trees needed to be rounded over and given a symetrical shape and other trees needed to have the dead limbs removed. During this discussion I called David's attention to the location of the power lines near the trees that were to be trimmed and instructed him to be careful and not to get the bucket or any part of the boom any closer than six feet from the power lines.

"That David Quedens was familiar with the work to be done and aware of the location of the power lines near the job site.

"After this site investigation I submitted our bid to The Idaho First National Bank and they accepted our bid and gave us the job. I assigned David Quedens' crew to perform the work.

"Immediately after I learned of David Quedens' injury on July 13, 1973 I went to the scene of the accident in Sandpoint. I positioned the truck exactly where David Quedens had it positioned at the time he was injured. I then raised the boom and bucket so I was positioned near the power lines contacted by David Quedens. I determined from this location that there

wires. In addition, Quedens' position between the wires, as well as the witness Boyle's statements, indicates that plaintiff was aware of the wires.

was no reason for David Quedens to be in this position to carry out his job of trimming the trees."

On this record, there was no apparent reason for Quedens to be in this position to perform his tree trimming job. The district court stated in its Memorandum Decision, *inter alia:*

"Here Quedens knew of the purpose of the 'insulating link' and the absence of a proximity warning device. Most certainly beyond any doubt, he was fully aware of the danger of operating it in close proximity to high voltage lines. He nevertheless put himself in a totally unreasonable (if not unbelievable) position between two closely-spaced high voltage lines. In short, Quedens . . . voluntarily and unreasonably proceeded to a face-to-face confrontation with danger. . . .

"The conduct of Quedens, when one views his actual prior and then knowledge of all of the general and specific circumstances, his experience in the business, the safety training sessions of his employer, and the oral and written warnings actually known and given, takes on the appearance of an act of virtual self-destruction . . . ."

Helm, etc., et al. v. Pacific Power & Light Company, et al., Aug. 13, 1976 (D. Idaho, Civil 2-75-19), at R. 749.

During the oral argument, plaintiff's counsel responded to the contentions of defendants that plaintiff had not taken any depositions or filed any affidavits, so that no disputed issues of fact appeared in the record, by saying that he relied on answers to interrogatories. However, plaintiff's counsel attached to plaintiff's answers to interrogatories medical reports of Quedens containing this wording describing his inability "prior to his injury" to accept himself as being worthy of friendship and other pre-injury psychotic problems which were not inconsistent with the district court's above-quoted evaluation of his behavior at the time of the accident:

"David had a very troubled social history, marked by sexual identification problems, an unsuccessful marriage and an abortive attempt at military service. His mother, Mrs. Helm, reports that his life-style had stabilized somewhat immediately prior to his injury and that he was beginning to establish a network of friends, although he couldn't accept himself as being worthy of friendship. [R. 148]

. . .

"From his social history prior to his injury apparently the patient had a great deal of difficulty in adjusting to his sexual identity because of problems related to his father. . . .

"We will proceed to have the patient committed to Dammasch State Hospital for evaluation to determine if this is a

II. *The doctrine of momentary forgetfulness and § 302A of the Restatement of Torts do not permit recovery by the plaintiff on this record.*

Plaintiff's counsel cites no Idaho law adopting the principle which he calls the doctrine of momentary forgetfulness. Moreover, the principal case cited by plaintiff in support of the application of this doctrine, *Austin v. Riverside Portland Cement Co.*, 282 P.2d 69 (Cal. 1955), is clearly distinguishable from the situation presented by this record.[3]

Plaintiff also directs the court's attention to § 302A of the Restatement (Second) of Torts (1965).[4] That doctrine, however, is based on the inattentive or negligent acts of a person other than the injured plaintiff. See *Sulphur*

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psychotic break or all related to organic brain disease. We felt that if it is a psychosis and it can be treated then we would be very interested in working on the physical restoration; however, if this is all related to chronic brain syndrome secondary to anoxia, it is our feeling the patient will need institutional care for the rest of his life." [R. 150]

Also, the plaintiff's answer to Power Co.'s interrogatory 63, requesting identification of persons "who you expect to call as an expert witness at . . . trial:"

"At this time no expert is known who is expected to be called at the time of trial." (R. 109)

discloses that plaintiff had no evidence from expert witnesses to offer in his case. As noted below, experts relied on after the summary judgment order of August 1976 could not be considered by the district court, as stated in its October 12, 1976, order.

[3]In that case the two plaintiffs, apparently informed about the wires, were instructed to work at night when only minimal lighting was available. Further, the plaintiffs themselves did not come in contact with the power lines, but rather the machinery made the contact.

[4]Section 302A of the Restatement (Second) of Torts provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person."

Springs Valley Electric Corp. v. Beltran, 478 P.2d 128 (Ariz. 1970). Quedens, however, had knowledge of the wires, was experienced in dealing with high voltage wires, and his position in relation to the trees he was about to cut was improper.[5] As noted above, Quedens' actions go beyond mere inattentiveness and border on intentional and deliberate conduct. *Cf. Sulphur Springs Valley Electric Corp. v. Beltran, supra.*

III. *Liability of Power Co.*

Although the record shows that the Power Co. knew of the tree-trimming activity prior to the accident, there is no evidence that it knew the Mobile bucket could be raised to the point of contact 39 feet above the ground, which was many feet above the minimum clearance required by law and industry standards.[6] The grant of summary judgment for the Power Co. on this record is supported by *Probart v. Idaho Power Co.*, 74 Idaho 119, 258 P.2d 361 (1953).

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[5]Plaintiff contends in his brief that the position of Quedens at the time of the accident was not improper or unexplainable, since he was evaluating the size and shape of the tree before proceeding with the cut (appellant's brief at 11). Although plaintiff cites no record or other support in his brief for this explanation, Sharpe's deposition makes vague references to Quedens' "usually look[ing] at [the trees] from a distance," but gave no estimate of that distance (Sharpe's deposition at 139). Also, there was no evidence that Quedens was looking at trees when he dropped his arms to his side.

[6]Plaintiff cites *Burke v. Illinois Power Co.*, 373 N.E.2d 1354 (Ill. App. 1st Dist., 3d Div. 1978), in support of his position. However, *Burke* is clearly distinguishable. In *Burke* a number of employees admitted seeing the plaintiff's crane in close proximity to the power lines and, against proper company practice, did not warn individuals nor file a report with their supervisors. Moreover, the employees stated that lay persons (the plaintiff) could not be expected to judge distances of power lines above them and it was, therefore, necessary to warn them of the danger.

IV. *Liability of the Bank*

Under Idaho law, an employee of an independent contractor is an invitee upon the premises of the owner or proprietor, *Carr v. Wallace Laundry Co.*, 170 P. 107 (Idaho 1918), and a landowner has no duty to warn of open and obvious dangers of which an employee knew or should have known. *Otts v. Brough*, 409 P.2d 95 (Idaho 1965); *Ramon v. Interstate Utilities Co.*, 170 P. 83 (Idaho 1917). Therefore, even assuming that Quedens had not been previously warned, the landowner would not be liable since the evidence in the record shows that there was nothing obstructing Quedens' view of the wires.[7]

Idaho law also dictates that an employer of an independent contractor is not liable for the acts and omissions of the independent contractor unless the employer retains control over the details of the work. *See Ramon v. Interstate Utilities Co.*, 31 Idaho 117, 170 P. 88 (1917). No such control was maintained by the Bank. It did not direct the manner of trimming the trees.

The plaintiff primarily relies on §§ 416 and 427 of the Restatement (Second) of Torts, which create an exception to this general rule. They impose a non-delegable duty on the employer of an independent contractor where there are peculiar risks of physical harm to others, unless special precautions are taken, in situations where the employer

[7]Plaintiff's Rule 60(b) motion was based on the "newly discovered" evidence of the opinion of Scott Beamer, an electrical engineer, who conducted an experiment and concluded that it would have been impossible for Quedens to have seen the wires if he was moving about in the manner described by Boyle and Sharpe. This Rule 60(b) motion was properly denied. See discussion below at pp. 12-13.

should recognize such risks. The plaintiff cites no Idaho case law adopting this view. In any event, the sections are inapposite to the case at bar where there is no allegation or evidence that the independent contractor, Davey Co., was negligent.[8] Moreover, the power lines were not over the Bank's property. The Bank did not own them, maintain them or have control over them, and Quedens was not on Bank property when the accident occurred.[9]

V. *Liability of Mobile*

We agree with the district court that the motion to dismiss filed by Mobile must be granted because there was no jurisdiction *in personam* over that company. See *Helm, etc., et al. v. Pacific, etc., supra* at R. 747-48.[10]

[8]The Introductory Note to § 416 of the Restatement states that this section does not rest upon personal negligence of the employer of the independent contractor, but upon vicarious liability, for the failure of the independent contractor to exercise due care.

[9]The plaintiff cites *Burke v. Illinois Power Co.*, 373 N.E.2d 1354 (Ill. App. 1st Dist., 3d Div., 1978), in support of the Bank's liability. However, in *Burke* the owner kept supervisors at the site at all times and had the power to stop the work if an unreasonable danger arose. *Id.* at 1370.

[10]Assuming, for the purposes of argument, that Idaho had jurisdiction over Mobile, we conclude that Mobile was not liable for Quedens' injuries.

The plaintiff relies on the theory of strict liability in tort, § 402A of the Restatement (Second) of Torts, which has been adopted by Idaho. *Shields v. Morton Chemical Co.*, 518 P.2d 857 (Idaho 1974). No defect in the boom, bucket or its mounting or control apparatus has been asserted. There is some evidence that proximity warning devices are used on other types of equipment, but these are long, ground-operated booms and cranes. In addition, signs warning of the dangers of the use of the boom in proximity to high voltage lines were furnished by the manufacturer and were in place on the equipment. Quedens knew of these warnings and of the danger of bringing the boom and the bucket too close to the wire.

The plaintiff asserts that it is irrelevant, in imposing liability, that the defect or danger is patent and cites *Micallef v. Miehle Co.*, 89 N.Y.2d 376, 384 N.Y.S.2d 115 (1976). The plaintiff contends that

VI. *Plaintiff's Motion for Reconsideration Pursuant to F. R. Civ. P. 60(b).*[11]

We find this motion properly denied and agree with the reasons set forth in the district court order of October 12, 1976. This motion is within the sound discretion of the trial court and, on appeal, the trial court's decision will not be disturbed unless there is demonstrated an abuse of discretion. *Schepp v. Langmade,* 416 F.2d 276 (9th Cir. 1969). Motions to reconsider based on newly discovered evidence under Rule 60(b)(2) must demonstrate that the evidence discovered is new and could not have been discovered by

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Micallef repudiated the old rule in *Campo v. Scofield,* 301 N.Y. 468, 95 N.E. 2d 802 (1950), which precluded recovery unless a latent defect or danger unknown to others was alleged and proven. *Micallef* did not expressly overrule *Campo,* but merely stated dissatisfaction with the rigid approach taken in *Campo.*

This court is not persuaded that the Supreme Court of Idaho would impose liability under facts similar to those involved here. Indeed, the New Mexico Supreme Court recently rejected a similar claim, and relying in part on Idaho case law held that a manufacturer of a 100-foot telescopic crane sold without either a proximity warning device or an insulated link was not liable under a theory of strict liability as a matter of law. *Jasper v. Skyhook Corp.,* 560 P.2d 934 (N. Mex. 1977). See *Rindlisbacker v. Wilson,* 95 Idaho 752, 519 P.2d 421 (1974); *Garner v. Crater Farms, Inc.,* 96 Idaho 383 (1974); *Mico Mobile Sales & Leasing v. Skyline Corp.,* 97 Idaho 408 (1975).

We also note plaintiff's cite to *Parker v. Lull,* 573 P.2d 443 (Cal. 1978), but find no indication that Idaho would similarly interpret § 402A at this time. We also find the facts of that case sufficiently distinguishable and, therefore, not persuasive authority in deciding the case at bar.

[11]Although the district court considered this motion for reconsideration, filed August 24, 1976, as a motion to alter and amend the judgment of August 13, 1976, under F. R. Civ. P. 59(e), see R. 795, it would appear that such a motion was untimely as there is no record evidence that it was served within 10 days of August 13 and it was not filed until August 24, 1976 (R. 757). For this reason, the court's order of October 13, 1976, denying the August 24 motion, has been treated as denial of a motion filed under F. R. Civ. P. 60(b).

the exercise of due diligence. 7 Moore's Federal Practice ¶ 60.23[4].

Plaintiff brought the motion on the basis of information received from an expert, Scott Beamer, an electrical engineer, who conducted an experiment at the site and concluded that it would have been impossible for Quedens to see the wires while he was in the bucket, moving in the manner described by Sharpe and Boyle. The plaintiff asserted that there was insufficient time to discover this expert advice due to time constraints in other unrelated matters.

The argument on the motions for summary judgment was heard on June 1, 1976, after one request by plaintiff for a continuance had been granted. After oral argument, the court gave the parties an opportunity to supplement their authorities. Counsel for plaintiff did not file any supplemental documents, even though he had arranged for the experiment by Mr. Beamer, which had taken place on July 13, 1976. On August 13, 1976, the court granted defendants' motion for summary judgment. Subsequently, on August 24, 1976, plaintiff filed her Rule 60(b) motion for reconsideration. Counsel for plaintiff states that Mr. Beamer conducted the "experiment" on July 13, 1976. There has been no showing that with due diligence such evidence could not have been presented to the court before August 13. Also, it would appear that at least parts of the declaration of Beamer were not admissible since he had no personal knowledge of many of the alleged facts

contained in it. See F. R. Civ. P. 56(e).[12] Also, the attached affidavit only states that he "acknowledged" before the notary public "that he executed the same" (R. 763).

The district court order of October 12, 1976, denying the motion for reconsideration filed August 24, 1976, will be affirmed.

[12]For example, the declaration states that Beamer was "informed about the position of Quedens at the time of the accident by Alex Sharpe" (R. 761, lines 3-5) and that "Jim Carlson went up in the bucket himself and confirmed to me . . . that the wires could not be seen from this position." Also, the affidavit does not state that the facts recited in it are true and correct under oath or show that "the affiant is competent to testify to the matters stated therein." See F. R. Civ. P. 56(e). There is no way to ascertain what facts or opinions are based on his observations or those of others such as Carlson and Sharpe.

Appendix B

In the United States District Court for the District of Idaho

Civil No. 2-75-19

Joan F. Helm, Individually and as Guardian ad Litem for David William Quedens, an incapacitated person,
Plaintiff,

Davey Tree Expert Company, a foreign corporation, and Aetna Casualty & Surety Co., a foreign corporation,
Plaintiff-Intervenors,

vs.

Pacific Power and Light Company, a Maine corporation; Mobile Aerial Towers, Inc., an Indiana corporation; and The Idaho First National Bank, a National Association,
Defendants.

[Filed August 13, 1976]

MEMORANDUM DECISION AND ORDER

The motions of all defendants for summary judgment have been briefed, argued and submitted. The motions are supported by answers to interrogatories, depositions, exhibits and affidavits. There is virtually no dispute or contradiction as to the material, genuine and dispositive facts.

Also under submission is Mobile's motion to dismiss and to quash service of process.

I.

STATEMENT OF FACTS

Plaintiff, David Quedens (Quedens) was first employed by Davey Tree Expert Company (Davey) at Boise, Idaho, from May to September, 1971, and from March to July 13, 1975. He had had some prior experience in tree trimming in California. His duties during the latter period were as a tree trimmer and crew foreman pursuant to instructions from his employer, Davey.

In the latter part of June, 1975, James Marria, a supervisor for Davey (and under whom Quedens had also worked in the 1971 period) was preparing a bid for tree trimming work for defendant, The Idaho First National Bank (Bank), on or near a lot owned by the Bank in Sandpoint, Idaho. If Marria's bid was accepted, he knew that Quedens and his crew would be assigned to the job. To insure Quedens' familiarity with the job site and the details of performance, Quedens accompanied Marria to Sandpoint.

While there the premises and physical features were viewed by both and instructions were given by Marria to Quedens as to the method and manner of trimming and Quedens' attention was specifically directed to the three power lines of defendant Pacific Power & Light Company (P. P. & L.) which passed diagonally over Second Street and over and above the trees near where a portion of the work was to be performed. The placement of these lines, which were not insulated except by height, were almost two times the minimum height required by the applicable safety code and public utility commission regulations, i.e., at the point of the tragedy 39 feet above street level. (The hearing

photographic exhibits No. 1, 2, 3, 4 and 5 graphically and clearly illustrate the physical situation with respect to the street, power pole, the overhead lines involved and the location of the Davey truck with defendant Mobile Aerial Towers, Inc.'s (Mobile) tower mounted thereon in the down position.) Marria instructed Quedens not to get the bucket (at the end of the hydraulically-extendible mobile tower) or any part of the boom nearer than six feet from the power lines. He had received previous safety instructions in the same vein.

The Bank accepted the bid and Quedens and his crew were assigned to do the work.

On July 4, 1975, Quedens, with his crew, an Alex Sharpe, traveled from Boise to Sandpoint. On July 6, 1975, Quedens and Sharpe inspected the site and planned their tree trimming and removal operations. In this they had a plat or chart of the area and the trees prepared by some other Davey employee. They commenced performance on July 7, 1975, and the work progressed without incident until the afternoon of July 13, 1975. Tree trimming had been done on the "inside" of the trees which overhung into the property of the Bank. The trees were not on Bank property. They were growing on public property of the City of Sandpoint, but were trimmed anyway pursuant to contract and instructions. To trim the "outside" of the trees the Davey truck with the Mobile tower was moved into the street and positioned for each tree. The truck was 4-6 feet from the curb and in the public street.

At the tree at the point where the accident occurred the truck was positioned directly under the power lines.

Quedens was in the bucket operating it and the boom from controls in the bucket. Being constructed of fiber glass material, the bucket was insulated against grounding. Quedens raised the boom and bucket to a position which resulted in the bucket stopping approximately one foot below and between two of the three wires. Quedens was then standing between the two wires which passed at about waist-level. He raised his hands and arms above the wires, appeared to be shouting or talking to Sharpe on the ground, and suddenly dropped both arms to his sides, making contact with both wires and sustaining severe and tragic personal injuries. Sharpe lowered the boom by the ground controls on the truck.

At the time of contact the bucket was positioned some 15-25 feet into the street and away from the tree trimming work area. There was no apparent reason or necessity for Quedens to be in this position to perform his tree trimming task.

Much of this detail comes from the uncontradicted testimony of one Lloyd Boyle, an independent and disinterested witness at the scene, as well as from Sharpe, Quedens' subordinate crew member.

No defect in the boom, the bucket or its mounting or control apparatus has been asserted or shown. All of the evidence is that it was in good condition and operating normally and smoothly. The manufacturer, Mobile, does not install electro-alarms or proximity warning devices on the boom or bucket. Plaintiffs supplied no evidence that it is feasible to do so, or is required by any code, regulation or industry safety standard. There is some evidence

that they are available, but are used only on other types of equipment working in close proximity to high voltage power lines, i.e., long ground-operated booms and cranes.

Quedens' immediate superior and his co-worker regarded him as a competent, experienced and knowledgeable tree trimmer and boom operator in the vicinity of power lines.

Signs warning of the dangers of the use of the boom in proximity to high voltage lines were furnished by the manufacturer, Mobile, and were in place on the equipment prior to and at the time of the accident.

As a part of Davey policy, Marria conducted weekly safety meetings for the benefit of his crews. Quedens participated in these "tailgate" meetings. Marria stressed to his crew the dangers involved and "that they should be extremely careful in operating our high rise booms near these power lines." Marria affidavit, pp. 1-2.

Other uncontradicted facts will be discussed hereinafter.

II.

SUMMARY JUDGMENT MOTION OF THE BANK

Plaintiffs (original and in intervention) claim the Bank violated duties to provide Quedens with a reasonably safe place to work and for its failure to inspect and warn him of hidden dangers. The undisputed facts above do not demonstrate a breach of any such duties, if they in fact apply to the Bank.

The Bank was not the owner nor in control of the public street nor of the instrumentality inflicting the injuries. Even if it be held that it assumed some duty or obligation

by contracting with Davey to have trees trimmed that it did not own, there has been no breach of duty to plaintiffs.

It was a reasonably safe place to work. The Bank had no control over the performance of the details of work. *Deshazer v. Thompson,* 89 Idaho 347, 404 P. 2d 604 (1965); 41 Am. Jur. 2d., Sec. 27, p. 783. The dangers, if any, in the working area were open, obvious and patent and not hidden or concealed. Quedens was experienced and competent and had been previously specifically warned by his employer. *Otts v. Brough,* 90 Idaho 124, 131, 409 P. 2d 95 (1965); *Ramon v. Interstate Utilities Co.,* 31 Ida. 117, 128, 170 Pac. 88 (1917); *Gagnon v. St. Maries Power & Light Co.,* 26 Ida. 87, 141 Pac. 88 (1914). *See also,* 31 A.L.R. 2d 1375, 1381-2, and *Christy v. Florida Power & Light,* 232 So. 2d 744 (1970). Indeed, the Bank, in all probability, had a right to rely on the superior knowledge and experience of Davey and its employees.

III.

SUMMARY JUDGMENT MOTION OF PACIFIC POWER AND LIGHT

There is, of course, no question of the ownership, control and maintenance of the uninsulated high voltage lines crossing over Second Street. The uncontradicted affidavit of Bert Leonard, P. P. & L.'s manager, establishes that P. P. & L. was in full conformity with and exceeded applicable federal and state statutes and regulations and industry standards. It is further uncontradicted that there were no defects in the "tap lines" contacted by Quedens

or any materially-related apparatus. The minimum clearance required for an energized line under the circumstances and at the location in question was 20 feet. Immediately after Quedens contacted the lines, the vertical distance was measured at 39 feet from street level to the lines. The point of contact, as measured by Leonard, was 25 feet West of the trees being trimmed.

These facts create prima facie evidence of the absence of negligence. *Probart v. Idaho Power Co.,* 74 Idaho 119, 258 P. 2d 361 (1953). Although power companies have the highest duty of care, *Probart, supra,* they are not insurers of those working near such transmission lines. *Clough v. New England Tel. & Tel. Co.,* 172 N.E. 2d 113 (Mass. 1961).

P. P. & L. was not required to anticipate or foresee this remote possibility nor to warn nor was it under a duty to insulate at a height of 39 feet. *Probart, supra; Clough, supra; Berry v. Atlantic Coastline Railroad Co.,* 273 F. 2d 572 (4th Cir. 1960); *Manaia v. Potomac Elec. Power Co.,* 268 F. 2d 793 (4th Cir. 1959), *cert. denied,* 80 S. Ct. 255; *Hall v. Lorain-Medina Elec. Coop.,* 148 N.E. 2d 232 (Ohio App. 1957).

On this motion for summary judgment, in the face of the prima facie showing by P. P. L., it was incumbent upon the plaintiffs to produce some credible evidence to rebut the prima facie absence of negligence. This they failed to do. Mere assertion and speculations in the briefs will not suffice.

IV.

MOTION TO DISMISS AND QUASH AND FOR SUMMARY JUDGMENT OF MOBILE

A. *Motion to Dismiss and Quash:*

Mobile was served with process in Indiana pursuant to Sec. 5-514, Ida. Code. It must be shown that it was either doing business in Idaho or committed some tortious act in Idaho.

This court is satisfied that Mobile was not "doing business" in Idaho. The "minimum contacts" requirement has not been met. In *Grobark v. Addo Machine Co.,* 158 N.E. 2d 73 (Ill. 1959), the court, construing *Hanson v. Denckla,* 357 U.S. 235 (1958), observes that it "stands for the proposition that there are still important territorial limitations on a State's power of in personam jurisdiction." All of the transaction involved here in the sale and purchase of the mobile aerial tower took place either in Indiana or Ohio. Insofar as "doing business" is concerned, *B. B. P. Association, Inc. v. Cessna Aircraft Co.,* 91 Idaho 259, 420 P. 2d 134 (1966), is distinguishable.

Was an allegedly tortious act committed in Idaho when it knowingly placed these towers in the "stream of commerce"? The Idaho Supreme Court has rejected the dichotomy that the negligent act and the injury must both concur in Idaho. The injury alone is sufficient, *Doggett v. Electronics Corp. of America, etc.,* 93 Idaho 26, 28-29, 454 P. 2d 63 (1969), if there is at least one contact in Idaho. In *Doggett* there was a direct sale of the boiler by nonresidents to a purchaser-user in Idaho. That is not the case here. Mobile has done nothing purposefully to avail

"itself of the privilege of conducting activities within the forum state . . .". *Hanson v. Denckla, supra,* at p. 253.

B. *Motion for Summary Judgment:*

In spite of the favorable disposition of Mobile's motion to quash service, this court feels compelled to rule on the merits of the motion for summary judgment.

All of the facts set forth elsewhere in this memorandum apply to this motion and compel the same result. Only one additional theory of liability requires some attention. Plaintiffs rely on strict liability in tort as against Mobile. Idaho has adopted Sec. 402A of the Restatement.

In pursuit of this theory plaintiffs cite to the court and strenuously rely upon *Jasper, Admin., v. Skyhook Corporation, etc.,* 547 P. 2d 1140 (N. Mex. 1976), among others of a similar nature.

The rig involved in *Jasper* was a 100′ telescopic crane operated from a cab on the ground—not by an operator in a bucket at the end of the boom. The boom had no "insulating link" or proximity warning device. Here there was an "insulating link" in the form of a fiberglass (nonconductor) bucket. Brown, a helper for the crane operator, who had no control of the situation, was electrocuted when the boom came in contact with high voltage lines. The deceased helper was standing on the ground.

The New Mexico court holds that before defendant can make out a valid defense as a matter of law, he must show that (1) decedent discovered the omission of the safety device; (2) he was aware of the danger, and (3) neverthe-

less, he made such an unreasonable use of the crane that it proximately caused his death. Here Quedens knew of the purpose of the "insulating link" and the absence of a proximity warning device. Most certainly beyond any doubt, he was fully aware of the danger of operating it in close proximity to high voltage lines. He nevertheless put himself in a totally unreasonable (if not unbelievable) position between two closely-spaced high voltage lines. In short, Quedens, unlike Brown in *Jasper,* voluntarily and unreasonably proceeded to a face-to-face confrontation with danger. There are other distinctions, but those noted suffice.

V.

PROXIMATE CAUSE AND CONCLUSION

Each legal theory relied upon by plaintiffs for liability as to each defendant has one common denominator in the essential elements—proximate cause.

The conduct of Quedens, when one views his actual prior and then knowledge of all of the general and specific circumstances, his experience in the business, the safety training sessions of his employer, and the oral and written warnings actually known and given, takes on the appearance of an act of virtual self-destruction for which the defendants are not liable under any reasonable view of the facts and the applicable law.

Quedens cannot be heard to say that he did not see what was plainly visible and obvious, especially when he had actual prior knowledge of the location of the lines

and the inherent dangers. *Ninio v. Hight,* 385 F. 2d 350 (10th Cir. 1967).

The actual and sole cause was the imprudence of Quedens. He alone made it a dangerous place to work.

IT IS ORDERED HEREBY that each of the motions for summary judgment are GRANTED and this action by plaintiffs is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED HEREBY that the motion of defendant Mobile Aerial Towers, Inc. to dismiss and to quash is GRANTED.

Judgment will be entered forthwith and defendants are awarded their costs.

DATED this 13th day of August, 1976.

/s/ J. Blaine Anderson
J. Blaine Anderson
United States Circuit Judge
Sitting by Designation

Appendix C

In the United States District Court for the District of Idaho

Civil No. 2-75-19

Joan F. Helm, Individually and as Guardian ad Litem for David William Quedens, an incapacitated person,

Plaintiff,

Davey Tree Expert Company, a foreign corporation, and Aetna Casualty & Surety Co., a foreign corporation,

Plaintiff-Intervenors,

vs.

Pacific Power and Light Company, a Maine corporation; Mobile Aerial Towers, Inc., an Indiana corporation; and The Idaho First National Bank, a National Association,

Defendants.

[Filed August 13, 1976]

JUDGMENT OF DISMISSAL

The summary judgment motions of the defendants were heard on June 1, 1976, following which the parties were given additional time to submit supporting authority. All counsel for the parties were present and the court heard arguments with respect to the motions. Based upon the mo-

tions for summary judgment, the answers to interrogatories, depositions, affidavits, exhibits and the pleadings and the other documents on file herein, the court has this date entered a Memorandum Decision and Order and concludes therein that there are no genuine and material issues of fact remaining for determination and that defendants, The Idaho First National Bank, Pacific Power and Light Company and Mobile Aerial Towers, Inc., are entitled to judgment as a matter of law.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the action of the plaintiffs and plaintiffs in intervention as against the said defendants be, and the same is hereby, DISMISSED WITH PREJUDICE. Defendants shall recover their costs in the sum of $305.25 Ida. 1st Nat'l Bank, $706.70 Pacific Power & Light

DATED this 13th day of August, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

Appendix C

In the United States District Court for the District of Idaho

Civil No. 2-75-19

Joan F. Helm, Individually and as Guardian ad Litem for David William Quedens, an incapacitated person,
Plaintiff,

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Pacific Power and Light Company, a Maine corporation; Mobile Aerial Towers, Inc., an Indiana corporation; and The Idaho First National Bank, a National Association,
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DATED this 13th day of August, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

Appendix D

United States Court of Appeals
for the Ninth Circuit

Joan E. Helm, individually & as Guardian ad Litem for David William Quedens, an incapacitated person, Plaintiff-Appellant vs. Pacific Power and Light Co., a Maine corp., Mobile Aerial Towers, Inc., an Indiana corp., and The Idaho First National Bank, a National Assoc., Defendants-Appellees Davey Tree Expert Co., a foreign corp. and Aetna Casualty & Surety Co., a foreign corp., Plaintiff-Intervenors	No. 77-1352
Joan E. Helm, etc., Plaintiff-Appellant vs. Pacific Power & Light Co., etc., et al., Defendants-Appellees Davey Tree Expert Co., etc., et al., Plaintiff-Intervenors	No. 77-1353

[Filed February 26, 1979]

ORDER DENYING REHEARING
BEFORE THE PANEL

Before: VAN DUSEN,* WRIGHT and GOODWIN, Circuit Judges.

*Senior Circuit Judge for the Third Circuit.

The petition for rehearing is denied.

Because of (a) the many misstatements of the record[1] and (b) the misstatements of this court's November 30, 1978, Memorandum in the Petition for Rehearing filed January 8, 1979, as a result of this court's generous grant to plaintiff of over twice the amount of time for filing such a Petition provded in F. R. A. P. 40(a), namely 39 days from November 30, 1978, to January 8, 1979, this supplemental language in answer to the Petition is being included in this order:

I. Point IV of the Petition for Rehearing contends that this court failed to determine what law would most likely

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[1]Examples of such misstatements are:

A. At paragraph 1 on page 2 of the Petition, plaintiff states:

"The witness Boyle wondered in one of his statements whether David actually knew his bucket was between the wires."

Again, paragraph 1 on page 4 of the Petition contains this misleading quotation of one sentence of Boyle's deposition:

"On page 6, line 2, this Court states that according to witness Boyle's statements David was aware of the wires. In actuality, in this respect, Boyle stated as follows:

'I was standing watching and when I seen him stop under the wires, I watched him raise and I was wondering to myself if he had seen the wires.'"

Following the above quoted statement from Boyle's deposition of July 18, 1973, Boyle stated:

"Q. Did he look up at any time, could you see him look up at the wires at any time?

"A. The first time he stopped raising he looked around and I could not say whether he looked up or not but when he was up in the wires he was facing right down the wires, *looking right down the wires when he hollered at his partner so he must have seen them.*"

(Emphasis supplied.)

Moreover, the statement quoted in the Petition refers to Quedens' movements in going up between the wires; the above question and answer refers to when Quedens was already between the wires and looking down at them.

be applied by the state in question were it called upon at the time in question to determine whether or not a particular doctrine of law should or should not be applied. However, the decision of the district judge as to the state laws governing any diversity case is entitled to great weight. This court in *Hunt v. Sun Valley Co., Inc.,* 561 F.2d 744 (9th Cir. 1977), stated that "[w]e accord substantial deference to a district court in its defining and applying the law of the state in which the court is sitting in diversity cases." This determination "'will be accepted on review *unless shown to be clearly wrong.*'" *C. R. Fedrick, Inc. v. Borg-Warner Corp.,* 552 F.2d 852, 856 (9th Cir. 1977). By citing specific cases on the issues of law presented by the record (746a-750a), the district court made clear its view as to the

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B. The Petition, at the top of page 2, inaccurately states that "the District Judge . . . [concluded] that David Quedens' act was an act of self-destruction." The exact language of the District Judge was:

"The conduct of Quedens, when one views his actual prior and then knowledge of all of the general and specific circumstances, his experience in the business, the safety training sessions of his employer, and the oral and written warnings actually known and given, *takes on the appearance of an act of virtual self-destruction. . . .*"

(Emphasis supplied.)

Helm, etc., et al. v. Pacific Power & Light Co., et al., Aug. 13, 1976 (D. Idaho, Civil 2-75-19), at R. 749.

C. At paragraph 2 on page 4, the Petition states: "Nowhere is there any statement that would indicate that David was given 'written warnings' by anyone, and the District Court's reference to such is unsupported by the evidence; . . . ." Contrary to such assertion, the record contains evidence that there was a decal on the truck warning against contact with live wires. See Deposition of John Marria at 44:25-45:14. There was also evidence of such warnings in a manual which Quedens directed his subordinate Sharpe to read and which was in the truck.

D. With reference to the statement in paragraph 2 on page 2 of the Petition that Boyle stated "that while lowering his hands David may have grabbed for the bucket," the actual statement of Boyle was:

applicable state law and, after careful consideration, we are unable to say that it was "clearly wrong."

Subsequent to the filing of all briefs, oral argument and the delayed Petition for Rehearing described above, plaintiff filed on January 16, 1979, a letter calling the court's attention to two Idaho Supreme Court cases, using the language that "temporary forgetfulness, inattention or distraction do not generally constitute contributory negligence." *Denton v. City of Twin Falls,* 54 Idaho 35, 28 P.2d 202 (1933); *Butland v. City of Caldwell,* 51 Idaho 483, 6 P.2d 493 (1931). These cases involved elderly plaintiffs falling on defective sidewalks and other circumstances far different from those involved in this case. Counsel for

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"A. Yes, he made some kind of a motion while he was hollering, when he hollered at his partner and from where I was standing it looked like he kind of held both hands out to his side, straight out, and then just dropped them.

"Q. What did it look like he was trying to do when he dropped his hands?

"A. *I really don't know what he was trying to do.* It was so quick that . . .

"Q. Did it look *like he perhaps wanted to grab the side of the bucket?*

"A. It *could* be. He *might have been* dropping his one hand to reach for the controls.

"Q. At what point do you think he got into the wires with his hands?

"A. He made contact almost immediately as he dropped them"

(Emphasis supplied.)

There was no evidence that plaintiff had lost his balance or for any reason was trying to steady his position by reaching for the sides of the bucket.

E. At paragraphs 11 and 12 on pages 2-3 of the Petition, the plaintiff makes reference to Beamer's experiment. The results of this experiment are not a part of the record, as pointed out on pages 10-11 of this court's November 30, 1978, Memorandum, because they were filed subsequent to the district court judgment of August 13, 1976.

plaintiff failed to call our attention to the more recent decision of the Supreme Court of Idaho in *Pearson v. City of Weiser,* 206 P.2d 263 (Idaho 1949), where the court cited the above *Butland* case but pointed out that the court did not approve

> ". . . an instruction that one may forget or be inattentive or indifferent to a known danger sufficient to produce injury and at the same time be driving his motor vehicle in the manner of an ordinarily prudent and careful man.
>
> ". . . This case is to be distinguished from those where there were no circumstances tending to distract or divert attention."[2]

206 P.2d at 270.

Furthermore, the basis for the district court's decision in this case emphasized the lack of fault of the defendants on this record, as opposed to any contributory negligence of plaintiff. We note the discussion of the Bank's liability at 746a of the record and the discussion of the Power Company's liability at 747a of the record. In regard to the manufacturer's liability, we note the following language of the district court:

> "No defect in the boom, the bucket or its mounting or control apparatus has been asserted or shown. All of the evidence is that it was in good condition and operating normally and smoothly. The manufacturer, Mobile, does not install electro-alarms or proximity warning devices on the boom or bucket. Plaintiffs sup-

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[2]The only circumstances tending to distract or divert the attention of Quedens was caused by him, since the testimony of Boyle made clear that Quedens started the conversation with Sharpe immediately prior to his contact with the wires. See page 20 of Boyle's deposition of 8/11/75.

> plied no evidence that it is feasible to do so, or is required by any code, regulation or industry safety standard. There is some evidence that they are available, but are used only on other types of equipment working in close proximity to high voltage power lines, i.e., long ground-operated booms and cranes."

Record at 745. Moreover, the court determined that it had no jurisdiction over Mobile on the facts of this record and under the applicable laws. See text at V of November 30, 1978, Memorandum.

II. Point V of the Petition contends that this court misinterpreted § 302A of the Restatement of Torts Second. Contrary to the plaintiff's contention, § 302A will not support recovery. This doctrine is based on an initial negligent or inattentive act of a person other than the injured plaintiff, the result of which causes the injury to an inattentive or negligent plaintiff. There is no evidence on the record that the Power Company was negligent. Moreover, Quedens' actions go beyond mere inattentiveness and border on intentional and deliberate conduct.

III. Point VIII of the Petition contends that this court has misinterpreted the purpose of §§ 416 and 427 of the Restatement of Torts Second. These sections of the Restatement have not been misread and do not support recovery by the plaintiff. A reading of these sections makes it clear that an employer of an independent contractor is liable for harm caused to others *as a result of a failure of the independent contractor to exercise reasonable care.* See the Introductory Note to § 416 of the Restatement.

There has been no record proof that Davey Co. failed to exercise reasonable care.

For the foregoing reasons, as well as those stated in the November 30, 1978, Memorandum, the Petition for Rehearing addressed to the panel is being denied.